NO. 89-1600

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In the
Supreme Court of the United States

OCTOBER TERM, 1989

BOBBY R. LITTLE
and
NORTH MISSISSIPPI SUPPLY COMPANY, INC.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the United States Court of Appeals for the Fifth Circuit failed to follow the teachings of the Supreme Court in a landmark mail fraud case, *McNally v. United States,* 483 U.S. ____, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987).

2. The decision conflicts with decisions or other United States courts of appeals on the same subject, Rule 10(a) *Supreme Court Rules.*

3. Whether the Act of Congress, 18 *U.S.C.* 1346, (*effective November 18, 1988*) subsequent to the commission of the alleged mail fraud in this case should have been considered in affirming this conviction.

The Fifth Circuit held:

> This new section effectively overrules *McNally* by eliminating the requirement of property loss. Although Little's conviction is not effected by Section 1346, its passage ensures that this circuit's present mail fraud jurisprudence will in the future be the nation's mail fraud jurisprudence.

Therefore, the Fifth Circuit adhered to its previous application of *McNally* although, as the petitioner contended from the outset, that under *McNally* this particular prosecution could not stand.

LIST OF PARTIES

The identity of the parties to this case appears in the caption of the case.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

BOBBY R. LITTLE
and
NORTH MISSISSIPPI SUPPLY COMPANY, INC.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above mentioned case, on which petition for rehearing and for rehearing en banc were denied January 9, 1990, Supreme Court Rule 13.1.

OPINION BELOW

The original decision of the United States Court of Appeals for the Fifth Circuit, affirming the convictions of the petitioners is dated November 24, 1989, 889 F. 2d 136, a copy of which is set forth in the Appendix.

JURISDICTION

The petitions for rehearing and for rehearing en banc were denied by the Fifth Circuit Panel on January 9, 1990.[1]

Jurisdiction of the Supreme Court is grounded on 18 *U.S.C.* Section 1254(1).

STATEMENT OF THE CASE

North Mississippi Supply Company, a Mississippi corporation, was in the business of manufacturing metal culverts for use in the construction and maintenance of public roads. Bobby Little was its operating officer. The Corporation and Mr. Little sold culverts to counties in North Mississippi, acting through their respective Boards of Supervisors. The price was determined by being either the low bidder for the supply of such materials or by an amount fixed by an official state agency clothed by statute with that authority. All culverts sold by Petitioners under this system were delivered at the price thus fixed.

The counties got everything they bought and at the indicated price. There were no false invoices and no price inflated invoices.

Subsequent to the delivery of the purchased culverts, Bobby Little, at various intervals, would deliver cash gratuities to the various county supervisors, generally amounting to five percent (5%) of the value of the culverts

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1. The Circuit Panel denied a stay of sentence pending disposition of a petition for certiorari. Bobby R. Little is in the custody of the U.S. Bureau of Prisons.

so sold and delivered.

The federal grand jury indicted Little and the Corporation on 264 counts of federal mail fraud (18 *U.S.C.*, Section 1341), representing the various instances in which the gratuities were given.

This Petition is directed only to the convictions for mail fraud and the alleged conduct inseparably associated therewith.

This is so because, as the Petitioner strongly contended in the District Court and the Court of Appeals, the counties had not been defrauded of any property whatsoever, an indispensable recquisite of *McNally* v. *United States*, 483 U. S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987). The counties got everything they bought and everything the Petitioners had sold, at a lawfully fixed price.

Although the prosecution had the burden of proof beyond a reasonable doubt, there was no evidence that there were those who were willing to sell or sought to sell the culverts at a price lower than the low bid price or the state ordained contract price.

The Court of Appeals was entirely correct when it said in its opinion affirming the conviction that the fedendants contended that the counties were never defrauded. The Court of Appeals further recognized that *McNally* stands for the principle that, "if the county did not suffer some property harm, the federal fraud statute cannot support a conviction".

Nevertheless, the Fifth Circuit affirmed the mail fraud conviction.

As its opinion indicates it relied on several of its previous cases.

The first was *U. S. v. Fagan*, 821 F. 2d 1002, 110-111, cert denied, 484 U. S. 1005 (1988). However, this was a case in which the contractor was willing to sell his product to the county for the stated price less the kickback amount, which is not the situation here.

The next Fifth Circuit case was *U. S. v. Matt*, 838 F. 2d 1356, 1358, *cert. denied*, ____ U. S. ____, 108 S. Ct. 2020, 100 L. Ed. 2d 607 (1988) in which it was held that the denial of "economically material information" can constitute mail fraud. Again, Petitioners contended that this case was not in point because of the applicable Mississippi statutes. The Petitioners were specifically relieved of the obligation of informing the counties of the gratuities, whereas, the recipients were required to report the gratuities and turn them in to the county treasury.

Finally, the Court relied on its decision in *U. S. v. Richerson*, 833 F. 2d 1147, in which it was held that concealing economic information constitutes a property loss. Again, the Petitioner contended, unsuccessfully, as it turns out, that no relevant economic information was concealed from the county because the purchases were made and the sales were made in conformity with low bids or state approved prices.

The Fifth Circuit concluded that "the counties may have been able to get the same materials for less than the maximum price allowed by law". The fatal defect in this view is that there was no proof offered on behalf of the government that from any source it could have obtained these culverts for less money than they actually paid.

The Fifth Circuit opinion recognized the existing decisions in other circuits as follows:

(1) A breach of fiduciary duty is not sufficient property deprivation to constitute mail fraud, *U. S.* v. *Ochs*, 842 F. 2d 515 (First Circuit, 1988);

(2) Depriving state entity of material information is not denial of property to constitute mail fraud, *U. S.* v. *Cavino*, 837 F. 2d 65 (Second Circuit, 1988);

(3) Constructive trust is not a basis for a mail fraud conviction, *U. S.* v. *Zauber*, 857 F. 2d 137 (3 Cir.) cert denied subnom, *Scotto* v. *U. S.*, ____ U. S. ____ 109 S. Ct. 1340, 103 L. Ed. 2d 810 (1989);

(4) Witholding information from a government entity is insufficient to uphold a mail fraud conviction, *U. S.* v. *Slay*, 858 F. 2d 1310 (8 Cir. 1988);

(5) Paying kickbacks does not violate the property requirement, *U. S.* v. *Lance*, 848 F. 2d 1497 (10 cir., 1988).

(6) Breach of fiduciary duty does not violate the mail fraud statute, *U. S.* v. *Conover*, 845 F. 2d 266.

The Fifth Circuit concluded at the close of its opinion,

> This Circuit's construction of *McNally* defines 'property' to include economic information, such as that denied Pontotoc and Monroe Counties in this case. Further, future convictions under Section 1341 will no longer require a substantive 'property' loss, so we see no reason to change our circuit precedent to require one for this case alone.

REASONS FOR GRANTING THE WRIT

In view of the foregoing, the Petitioners respectfully submit:

(1) Under the law applicable at the time of the commission of the alleged offenses, particularly *McNally v. U. S.*, these convictions for mail fraud cannot stand because the counties received everything they bought at the agreed price as fixed by either the low bid or the state approved contract price. Most assuredly, the counties were not defrauded of any property;

(2) The Fifth Circuit precedents relied upon for the affirmance of this conviction conflict with the decisions of other circuit courts of appeal as hereinabove set forth and are against the great weight of authority;

(3) Under *ex post facto* Constitutional principles, a subsequent Act of Congress could have no application to this mail fraud case;

(4) That there will be no future cases under the previously existing jurisprudence (applicable to this case) cannot be used to save these convictions. Such would be a denial of due process and fundamentally unfair.

(5) The other convictions under other statutes which otherwise appear regular in form and content were fatally infected by the inadmissible and highly prejudicial mass of mail fraud proof.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted, the mail fraud convictions should be reversed after a hearing on the merits, and the other convictions should be remanded for a new trial.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee.

v.

Bobby R. LITTLE and North Mississippi Supply Company, Inc.,
Defendants-Appellants.

No. 89-4041.

United States Court of Appeals,
Fifth Circuit.

Nov. 24, 1989.

Defendant was convicted in the United States District Court for the Northern District of Mississippi, at Aberdeen, Glen H. Davidson, J., of federal bribery and mail fraud, and defendant appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) defendant's acts of selling pipe to counties and giving kickbacks to the county officials who granted the contracts constituted a violation of the federal mail fraud statute, and (2) defendant was properly convicted under the federal bribery statute.

Affirmed.

See also, 687 F.Supp. 1042.

Appeal from the United States District Court for the Northern District of Mississippi.

Before GARZA, WILLIAMS and DAVIS, Circuit Judges.

GARZA, Circuit Judge:

Bobby Little, sole owner of North Mississippi Supply Co., Inc., was convicted on numerous counts of Federal bribery and mail fraud after selling culvert pipe to Mississippi counties and giving kickbacks to the county officials who granted the contracts. Alleging that the counties were never defrauded because he sold the culvert at state-mandated prices, Little brought this appeal. We affirm the conviction.

Background

In Mississippi, each county's administration consists of supervisors who take bids and award county contracts. Seeking to uncover corruption among the supervisors, the Federal Bureau of Investigation (the "FBI") set up "Operation Pretense." Under that plan, the FBI would send a supposed salesman to see a supervisor, the salesman would offer a bribe or the like, and the FBI could then prosecute the supervisors who were attempting to defraud their counties. After several supervisors had been charged, they cooperated with federal authorities two investigate the contractors in the area to catch them in the same way.

Little sold culvert pipe to Monroe and Pontotoc counties after winning the contracts in state-regulated bid processes or by selling to the counties at state-set prices. But, after he had delivered the materials to the county, he would routinely pay 5% of the purchase price back to the supervisor who had awarded him the contract. Although Mississippi has a statute requiring supervisors in that position to report and remit the payments to the county,

none of the supervisors ever did. Miss. Code Ann. Sec. 31-7-23 (1972).

Little was indicted on 264 counts of federal mail fraud (18 U.S.C. § 1341),federal bribery (18 U.S.C. § 666), conspiracy (18 U.S.C. § 371), and aiding and abetting (18 U.S.C. § 2). After the district court denied his motions to dismiss, he was tried and convicted by a jury, in part based on the testimony of the convicted county supervisors who were awaiting sentencing. This appeal followed.

Mail Fraud

[1] Little argues that, because the counties paid only the state-set price for culverts or awarded him the contract as lowest bidder, the counties were not defrauded. Therefore, he says, his action cannot constitute a violation of the federal mail fraud statute.[1] The argument is that the county got everything it paid for, paid the state-set price or awarded the contract to the lowest bidder, and did not suffer any property damage. Little relies primarily on *McNally v. U.S.*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). In that case, the Supreme Court reversed a mail fraud conviction under section 1341, stating that the section "clearly protects property rights, but does not refer to the intangible rights of the citizenry to good government." *McNally*, 483 U.S. at 356, 107 S.Ct. at 2879, 97 L.Ed.2d at 299-300. In short, if the county did not suffer some proper-

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[1] The federal mail fraud statute, 18 U.S.C. § 1341, provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to [use the mails], shall be fined not more than $1000 or imprisoned not more than five years, or both."

ty harm, the federal fraud statute cannot support a conviction.

Shortly after deciding *McNally*, the Supreme Court addressed the issue again in *Carpenter v. U.S.* 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). There, the Court narrowed *McNally* by including intangible property rights as well as tangible in the scope of section 1341 protection.

This court has addressed *McNally's* scope in several cases, and has held that the state entity suffers a property loss when a contractor gives a kickback from his own money, even when he was the low bidder, because the contractor was willing to sell his product to the county for the stated price less the kickback amount. *U.S. v. Fagan*, 821 F.2d 1002, 1010-1011 (5th Cir.), *cert. denied*, 484 U.S. 1005, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988). The economic value of the knowledge that the contractor would sell for less is sufficient "property" to implicate section 1341. The result was the same in *U. S. v. Matt*, 838 F.2d 1356, 1358 (5th Cir.), *cert. denied*.____ U.S. ____, 108 S.Ct. 2020, 100 L.Ed.2d 607 (1988) (denial of "economically material information" can constitute mail fraud) and *U.S. v. Richerson*, 833 F.2d 1147 (5th cir. 1987) (concealing economic information constitutes a property loss).

Little argues that these cases should be distinguished because they involved unregulated markets, where his actions involved a regulated market with state-fixed prices. But those prices were ceilings, not floors. The counties may have been able to get the same materials for less than the maximum price allowed by law.

Given this construction, Little's conviction should stand in this Circuit. But Little makes much of the fact that other Circuits, construing *McNally, disagree with the*

Fifth Circuit.[2] He argues that we should abandon our line of cases to bring our Circuit into step with the others. We decline to do so, and note that the other Circuits are now required to be in line with us. Congress recently enacted 18 U.S.C. § 1346, which became effective November 18, 1988.[3] This new section effectively overrules *McNally* by eliminating the requirement of property loss. Although Little's conviction is not affected by section 1346, its passage ensures that this Circuit's present mail fraud jurisprudence will in the future be the nation's mail fraud jurisprudence.

Bribery

[2] Little was convicted on numerous counts of violating 18 U.S.C. § 666, the federal bribery statute.[4] He

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2. Decisions in other Circuits include the following cases: *U.S. v. Ochs*, 842 F.2d 515 (1st Cir. 1988) (holding that a breach of fiduciary duty is not sufficient property deprivation to constitute mail fraud); *U.S. v. Covino*, 837 F.2d 65 (2d Cir.1988) (depriving state entity of material information is not denial of property to constitute mail fraud); *U. S. v. Zauber*, 857 F.2d 137 (3rd Cir.), *cert. denied sub nom Scotto v. U.S.*, ___ U.S. ___, 109 S.Ct. 1340, 103 L.Ed.2d 810 (1989) (constructive trust rejected as basis for mail fraud conviction); *U. S. v. Holzer*, 840 F.2d 1343 (7th Cir.1988) (rejecting past circuit "intangible rights" precedent in light of *McNally*); *U.S. v. Slay*, 858 F.2d 1310 (8th Cir. 1988) (stating that withholding information from a governmental entity is insufficient to uphold a mail fraud conviction); *U.S. v Dadanian*, 856 F.2d 1391 (9th cir.1988) (failure to supply property element renders indictment invalid); *U.S. v Lance*, 848 F.2d 1497 (10th Cir.1988) (paying kickbacks does not violate the "property" requirement); *U.S. v. Conover*, 845 F.2d 266 (11th Cir.1988) (breach of fiduciary duty does not violate the mail fraud statute).

3. Section 1346 provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

4. Section 666 provides, in pertinent part: "(a) Whoever . . . (2) corruptly gives, offers or agrees to give anything of value to any person, with in-

argues now that his convictions should be overturned because there was no proof of corrupt motive, since he paid the gratuities out of his own money and never intended to influence the supervisors. The jury in his trial did not believe him, but instead apparently found that the payments were rewards for past contracts and bait for the granting of future contracts. We will not disturb that verdict.

[3] Little also argues that the federal bribery statute should not apply in this case absent proof that the corruption cost would have to be replaced by federal funds. That is, section 666 applies only where the agency involved receives "benefits in excess of $10,000 under a Federal program" in any given year. Sec. 666(b). But this court in *U.S. v. Westmoreland*, 841 F.2d 572, 576 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 62, 102 L.Ed.2d 39 (1989), rejected that argument in another prosecution under "Operation Pretense." There, the court held that if the agency received $10,000 in any given year, then the agents were subject to Sec. 666. There is no requirement that the particular program be the recipient of the federal funds.

Footnote 4 continued.

tent to influence or reward an agent of an organization or of a State, ... or any agent thereof, in connection with any business, transaction, or series of transactions of any such organization government, or agency involving $5,000 or more, shall be fined under this title, imprisoned not more than ten years, or both."

CONCLUSION

This Circuit's construction of *McNally* defines "property" to include economic information, such as that denied Pontotoc and Monroe counties in this case. Further, future convictions under sec. 1341 will no longer require a substantive "property" loss, so we see no reason to change our Circuit precedent to require one for this case alone. For these reasons and those stated above, Little's conviction is in all things AFFIRMED.